

STATE BAR OF MICHIGAN REAL PROPERTY LAW SECTION

POLICY POSITION IN OPPOSITION TO HB 4613

May 30, 2013

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The Real Property Law Section opposes House Bill 4613 for the reasons discussed below. The Real Property Law Section is a voluntary membership society of the State Bar of Michigan. Membership in the Real Property Law Section is open to all members of the State Bar of Michigan, but generally comprises attorneys who practice and are interested in real property law. The Real Property Law Section Council voted to oppose the bills by electronic vote on May 30, 2013, after discussion, in accordance with its bylaws. Of the 17 voting members of the Real Property Law Section Council, 17 voted in favor of the position to oppose HB 4613, 0 voted against. The State Bar of Michigan has no position on this matter; the positions expressed are those of the Real Property Law Section only.

HB 4613 would protect landlords from liability when using self-help to take possession of premises after the death of a tenant. The justification offered is that landlords are forced to go through a lengthy and costly process before they can take possession of a rental unit, clear out the personal belongings of the deceased, and rent the unit to new tenants.

The bill would amend the antilockout statute, MCL 600.2918, not the summary proceedings statute. The new exception would apply if

- the owner informs the tenant in writing of the tenant's option to provide contact information for an authorized person in the event of the tenant's death;
- current rent has not been paid;

- the owner believes in good faith that the tenant has been dead for at least 18 days, and there is no surviving tenant;

- after the 18 days has run, and not less than 10 days before the owner reenters to take possession of the premises and dispose of the tenant's property, the owner makes a "reasonable attempt" to contact the authorized person and request the opening of a probate estate, places a notice on the door of the premises 10 days before taking possession, and notifies the county public administrator of the owner's belief that the tenant is dead and that the owner intends to take possession of the premises and dispose of the tenant's property.

The owner may then proceed unless a probate estate has been opened or has not been notified in writing of a probate estate in another county and the name and address of the personal representative.

Michigan has a longstanding judicial and legislative aversion to self-help in evictions, and the antilockout statute is the cornerstone. As described by the court in *Deroshia v Union Terminal Piers*, 151 Mich App 715, 391 NW2d 458 (1986), at 459-460:

At common law, a landlord could use reasonably necessary force to remove a holdover tenant or other unauthorized occupant of his land [citation omitted]. However, this rule was very early modified by statute to prohibit *forceful* entry by the landlord, in the interest of protecting the peace. The forcible entry and detainer statute has remained unchanged in substance and is incorporated as subsection (1) of the present antilockout law, MCL 600.2918 ... The statute was held to prohibit forceful self-help regardless of whether or not the tenant was in rightful possession of the premises. *Gallant v Miles*, 200 Mich 532; 166 NW 1009 (1918). The statute was amended in 1977 to add a subsection [prohibiting changes, alterations, or additions to the locks or other security devices] eliminating self-help altogether even where not forceful except in certain narrowly defined circumstances ... The addition of this subsection virtually eliminates the self-help remedy in Michigan in favor of judicial process ... The landlord is not permitted to be the judge of his own rights in the adversely held property, but must use the judicial remedy given by law to secure it.

To facilitate resort to judicial process, the Legislature has provided the summary procedure in the district court to recover possession of realty, MCL 600.5701 *et seq.*, whereby the matter is heard in an expeditious proceeding. See, MCL 600.5735. Under MCL 600.5750, the landlord is, in addition to repossession, entitled to damages from the time of demand for possession or notice to quit.

The court held that the tenant in *Deroshia* was entitled to actual damages suffered solely as result of the landlord's use of self-help rather than judicial process.

Judicial oversight ensures that there is some minimum level of due process.

Michigan real property attorneys advise their clients to go to court to get an order for possession because, in light of that law and its longstanding application, the courts do not look kindly on a landlord who uses self-help. The two firms that handle most of the foreclosure evictions in Michigan obtain a court order for eviction even if the premises appear abandoned because the eviction provides protection for both sides.

Creating an exception for a deceased tenant allows the landlord to act without any court order and opens the antilockout statute to doubt, as well as suggesting possible future exceptions for other circumstances. The problem to be addressed does not seem to warrant that drastic a change in the law.

As written, the amendment addresses a limited situation where the rent is not paid and there is no estate (at least as yet) to take possession of the property of the deceased tenant. Under current law, using the summary proceedings statute, the landlord can give a seven-day notice to quit for failure to pay rent, and if the rent is not paid, can file an action in the district court to recover possession. A hearing is set, and if the tenant does not appear (obviously the case with a deceased tenant), judgment can be entered and a writ of restitution issued in ten days. The landlord can then have the bailiff or sheriff put the tenant (or tenant's belongings in this case) out.

If the concern is liability for disposal of the tenant's property, the summary proceedings statute directly addresses it through the judgment for possession and writ of restitution – a landlord cannot be held liable for acting pursuant to a court order. If it is the peculiar nature of dealing with the affairs of a deceased tenant, then adding these provisions (or ones like them) to the summary proceedings statute would answer the same issues without raising the same concerns that self-help raises.

Over the last few years, there have been amendments creating special notice provisions to speed eviction for specified bad acts and bad actors. None of those have amended the antilockout statute, and an additional concern is that this will open a series of future amendments to the antilockout statute, for similar "good" purposes, expanding self-help and eliminating the protection of the courts.